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IN THE

Supreme Court of the United States

October Term, 1963
No. 240

AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, a California corporation, EASON MONROE,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

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A. Respondent acknowledges that Rule 1310 is a censorship provision, but seeks to justify it on the ground that only self-censorship is involved. Thus respondent says (p. 6) "What it (the Regulation) does require is that the applicant censor itself."

If an evil worse than imposed censorship can be conceived, it is the evil of self-censorship. This Court has so ruled in *Smith v. California*, 361 U. S. 147, 154: "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

Self-censorship is as offensive here as it was in *Smith*. There, the bookseller would not stock the books and the public could not read; here, the speaker will not speak his mind and the public could not hear.[1]

Respondent further acknowledges, as did the court below, that the regulation challenged here is in that category of governmental action which involves (Resp. Br. 8) "'permit or licensing by a public authority,'" relying upon *Times Film Corporation v. Chicago*, 365 U. S. 43. That case did, in the special context there presented,[2] permit a prior censorship. But we do not consider that case applicable here (see footnote 2, *supra*). If the Court should consider *Times Film* apposite, then, we submit, the Court should reconsider the case and overrule it. However, because of the vast difference between *Times Film* and the instant case, we do not believe that to be necessary.

Respondent has, as we have shown, recognized that the Regulation sets up a system of prior censorship. But this Court has just noted that "'(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity'" (*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70, citing *Near v. Minnesota*, 283 U. S. 697 and other classic cases.)

How has respondent carried this heavy burden in its memorandum in opposition to certiorari? It has pref-

[1] This Court re-affirmed *Smith* only last term in *Bantam Books v. Sullivan*, 372 U. S. 58, in dealing with a comparable problem involving a "system of informal censorship" (p. 71).

[2] "At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record" (365 U. S. at 50).

fered no denial to petitioners' sweeping assertion[3] as to the absence of any danger warranting the requirement. Indeed, no other Board of Education in the entire State of California, with the exception of San Diego (see *ACLU v. Board of Education*, 59 A. C. 236, 379 P. 2d 16, 28 Cal. Rptr. 712), out of the One Thousand Six Hundred and Forty boards of education in the State,[4] has seen the need for, nor adopted, any oath or similar requirement; nor has the state legislature nor the people of California by popular vote (see Petition, bottom page 10). This scarcely suggests, and certainly respondent has not shown, any clear and present danger, nor any compelling subordinating State interest which justifies respondent's sweeping imposition of self-censorship.

B. It is not true, as urged by respondent (Br. 6, 10), that the Regulation "does not concern itself with the content of proposed speech" or with a "pre-determination of (the) acceptibility (of) what is to be said" or with "advocacy of any kind." Indeed we are unable to understand respondent's assertion (Br. 10) that "Rule 1316 is not aimed at . . . advocacy of any kind." Virtually the entire California Criminal Syndicalism Act (Penal Code 11400-11401) is concerned with advoca-

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[3] Petition pages 9-10:

> "Neither respondent, nor its counsel, nor the court below made any findings nor even any claim, and certainly no showing, that there was any, or a danger of any, advocacy of Criminal Syndicalism at all, much less in a public meeting held in a civic center dedicated to free speech. Nor was there any finding, claim or showing to justify the oath, that the all inclusive, 'any act which is prohibited by law or . . . any crime' was occurring at such public meetings."

[4] Letter of July 26, 1963 from Henry W. Magnuson, Chief, Bureau of Education Research, State of California, Department of Education to the writers of this brief.

cy.[5] Should one desire to discuss Criminal Syndicalism, as a political philosophy or otherwise, respondent Board passes on the question and makes a pre-determination, in advance, as to the nature and import of that doctrine.

C. Respondent is of the view (Br. 8) that since the Regulation "is aimed at future conduct", that makes everything all right. But in the nature of things, and one of its chief vices is that, the test oath applies to future conduct. (See *Speiser v. Randall*, 357 U. S. 513; *Re Summers*, 325 U. S. 561; dissenting opinion; *Girouard v. United States*, 328 U. S. 61; *cf.* Chief Justice Hughes, dissenting, in *United States v. Macintosh*, 283 U. S. 605). It is precisely to such oaths as to the future, that persons of conscience balk (*ibid.*).

Konigsberg v. State Bar of California, 366 U. S. 36, cited by respondent (Br. 9), is not apposite here. Not involved here is a privilege which requires of the applicant good moral character and the high regard and confidence of the public as was the case in *Konigsberg*. It is one thing to say that one may not be a lawyer without qualifying therefor. And in order to qualify, it may be proper to require of him the burden of showing, *prima facie*, that he does qualify. But one need not "qualify" in order to be entitled to the First Amendment rights of speech and assembly. Under our Constitution, a citizen has those "unalienable" rights without more.

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[5] *E.g.* Penal Code §11401 speaks of "spoken or written words", "advocates", "teaches", "justifies", "attempts to justify", "prints", "publishes", "edits", "issues", "circulates", "publicly displays", "books", "papers", "pamphlet", "document", "poster", "written or printed matter in any form", "containing or carrying written or printed advocacy, teaching", "advising", etc.

D. Respondent is quite in error in its statement (Br. 9) that under Rule 1310, the applicants "are referred to the California Penal Code for particular definitions of what is meant by the words 'crime' or 'acts prohibited by law.'" The very fact that skilled and competent counsel for respondent should consider that only the Penal Code is involved is dramatic demonstration of the vagueness of the regulation. In California, "crimes" are set forth in numerous codes other than the Penal Code,[6] as well as in its Constitution.[7]

Moreover, in California "acts prohibited by law" encompass not only codified situations,[8] but also those embodied in the decisions of the courts.[9]

Furthermore, the Regulation in question here is not limited to California crimes,[10] but includes "any act which is prohibited by law" and "any crime" which encompasses federal offenses as well, both those found

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[6]*E.g.*, Agriculture Code 1066.1, 1273; Business & Professions Code 600, 601; Civil Code 607f, 1858; Code of Civil Procedure 1208.69; Corporations Code 3020, 26104, 35302; Education Code 914, 28801, 28802, 23001; Financial Code 971, 1411; Fish and Game Code, 2011, 1059; Health and Safety Code 11500 *et seq.*; Health and Safety Code 12352; Government Code 15619, 9034; Harbors and Navigation Code 570, 571; Insurance Code 383, 833; Labor Code 971, 973, 974; Military & Veterans Code 648, 421; Probate Code 1155; Public Resources Code 2250, 2274; Public Utilities Code 583, 827; Revenue & Taxation Code 3441, 14774; Streets & Highways Code 27174.2, 27174.3; Unemployment Insurance Code 2102, 2111; Vehicle Code 23110, 10851; Water Code 6420, 21195; Welfare & Institutions Code 118, 7070. Needless to say, this sampling is not, nor is it intended to be, exhaustive.

[7]*E.g.*, Art. I, § 20; Art. IV, § 35, California Constitution.

[8]*E.g.*, Calif. Civil Code § 51, § 69.

[9]Calif. Civil Code § 1899.

[10]Even assuming, as respondent erroneously does, that Rule 1310 refers only to crimes and only to those crimes set forth in "the California Penal Code."

in Title 18 of the United States Code and those scattered throughout the rest of the federal statutes.[11]

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[11]We have not counted the number of California and federal crimes, and acts prohibited by California and federal law there may be, but we assume they run into the thousands, none of which is defined.